United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Petitioners and Plaintiffs Below,
vs.
FIRST NATIONAL BANK-DETROIT, a National Banking Corporation, and
NATIONAL BANK OF DETROIT, a National Banking Corporation,
Respondents and Defendants Below

BRIEF FOR PETITIONERS, WILLIAM ALFRED LUCKING AND MARGARET HOLMES DAVIS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The opinion is found in the Certified Record and reported in 142 F. (2d) 528.

II.

JURISDICTION

The date of the Judgment to be reviewed is April 21, 1944, when the judgment of the Sixth Circuit Court of Appeals was entered.

Appellate jurisdiction is based upon Section 344 of Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the said Court of Appeals which are relied upon by Petitioners are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

Petitioners rely upon and will urge before this Court, all of the errors therein assigned.

IV.

TWO MAIN QUESTIONS ARE INVOLVED—

FIRST: Was this Cause removable to the Federal District Court, and was a Remand properly refused?

SECOND: Should the Motions to dismiss have been granted?

V.

BRIEF SUMMARY OF FACTS

1st—The Plaintiffs' complaint is to compel the purchasing (new National Bank of Detroit)—

(a) to account, under the contract of sale of assets of April 12, 1933, and

(b) to pay for an appropriation of the old First National Bank's valuable good will.

2nd—The Plaintiffs' complaint *expressly disclaims any and all right to any relief*, except under the laws of Michigan and the common law in force in Michigan.

3rd—This express disclaimer by plaintiffs, of any and all rights and claims under the Constitution or laws of the United States determines the right of plaintiffs to try this case in the State Courts of Michigan.

Therefore, whether the Plaintiffs have a right of action, or the right to maintain this suit—removed by resident defendants to the United States District Court—must be determined by the State Court where it was started.

Odell v. Farnsworth Company, 250 U. S. 501.

In *Odell v. Farnsworth Company, supra*, this Court said:

> "The party who brings suit is 'master to decide what law he will rely upon' and the allegations of his bill are the evidence, or the expression, of his decision, upon which the courts must act in determining the question of their jurisdiction. *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22; *Healy v. Sea Gull Specialty Co.*, 237 U. S. 479."

The rule laid down by this Supreme Court is that—Plaintiffs may, and have the absolute right to determine and fix for themselves by their complaint "what law" they will "rely upon."

Consequently—the Complaint controls and determines whether any right or cause of action "arising under" any law of the United States is involved.

Neither an answer nor a motion to dismiss, or a removal petition, or any other pleading or paper can alter this rule.

Gully v. First National Bank, 299 U. S. 109.

4th—No claim is made in this complaint that the contract of sale and transfer of assets to new National Bank of Detroit is invalid.

No claim is made that any law of the United States has any effect whatever upon any right or interest of Plaintiffs or upon any issue or question in the case.

No law of the United States has any bearing upon the construction of this contract of sale of assets.

No right or interest of the Plaintiffs is sustained by one construction of a law of the United States, or denied by another construction of any such law.

5th—No claim is made against the old First National Bank. See paragraph 35 of the bill, R. 23.

This defendant was dismissed by Plaintiffs on February 16, 1943 (R. 60).

6th—Plaintiffs do claim that under the laws of Michigan and the common law in force in Michigan—that the new National Bank of Detroit is estopped to raise any defenses except on the merits.

See paragraph 31 (R. 21) of Plaintiffs' complaint.

7th—On April 20, 1942—the District Court (Hon. Arthur F. Lederle, presiding) denied Plaintiffs' motion to remand (R. 59) and notice of appeal from this order was filed (R. 115) and also from the District Court's order of dismissal. (R. 114.)

8th—The District Court in denying Appellants' motion to remand, was of opinion the bill presented a case of "winding up" of an insolvent bank (within the Dinan case rule) and was, therefore, removable. (R. 101, 104.)

9th—The Plaintiffs' position was that since the Complaint did not raise a Federal Question within the rule of the Gully case (299 U. S. 109) the resident defendants could not remove from the State Court (R. 102).

10th—Plaintiffs' counsel also pointed out (R. 102) to the District Court the distinction between (1) the present complaint filed in the State Court, and (2) two previous complaints filed originally in the Federal District Court, stating:

> "The two previous suits, your Honor involved a contention by the plaintiffs that the contract of sale was invalid as beyond the power of the conservator, having been made before the determination of insolvency and the appointment of a receiver. Those contentions were eliminated from this complaint.
>
> The sole question is an accounting under the contract which the First National Bank, or those interested in it primarily, are entitled to under this contract."

VI.

ARGUMENT ON LAW

Question of Remand

POINT I

The controlling Question is:

Whether the suit (disclosed by the complaint) is one "arising under the Constitution and Laws of the United States"—

within the rule laid down in *Gully v. First National Bank,* 299 U. S. 109?

It is to be observed that—

(a) Not every case which could be originally brought in a United States District Court—can be removed from a State Court.

(b) *Only* a case "arising under" a law of the United States *can be removed by a resident defendant.*

Section 71, of Title 28 of U. S. C. A.

Therefore, since Defendant Banks are residents of Michigan—this cause commenced in the State Court—can only be removed if the Plaintiffs' Complaint presents a claim or right of action—

"arising under" the Constitution or laws of the United States—within the rules laid down in

Gully v. First National Bank, supra.

Turning to the *Gully case* we find:

(1) A National Bank Receiver transferred most of the assets of an insolvent national bank to a newly organized National Bank of the same name.

(2) The Fifth Circuit Court of Appeals held the cause was one "arising under" the laws of the United States—but not one "for winding up" the affairs of the National Bank—

See page 506 of 81 Fed. (2d).

(3) This Court, in its opinion said:

> "Mr. Justice Cardozo delivered the opinion of the Court.
>
> Whether a federal court has jurisdiction of this suit as one arising under the Constitution and laws of the United States is the single question here. • • •
>
> "2. The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. • • •
>
> *Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit.*
>
> • • •
>
> *If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States,* though the bank would have the aid of the Constitution when it came *to its defense.* • • •"

CONCLUSION from the *Gully Case*—

A. The crucial test of removability is whether Plaintiffs' right of action is based on an Act of Congress—which

by one construction of the Act would sustain the claim—and by another construction would defeat the claim.

B. That an Act of Congress might render the State Taxes illegal—and thus, *as a matter of defense,* relieve the new Bank from liability—

did not show a removable cause—"arising under" the laws of the United States.

C. Plaintiffs may decide whether their claims are to be based and depend upon State and Common law. If Appellants' complaint so elects—that puts an end to a resident defendant's right to remove to the Federal Court.

See—

Odell v. Farnsworth, supra.

Summary of Reasons for Remand—

FIRST: To make a cause removable (a) from a State Court, (b) by a resident defendant, (c) the plaintiffs' complaint must show—(d) a case "arising under" a federal law, (e) which requires and means absolutely that—

(1) Plaintiffs' rights might *be sustained* under one construction of such law, or

(2) *be defeated* by another possible construction of such law.

SECOND: The *Gully case* and the case at bar are alike, in that:

(1) In each case an insolvent National Bank Receiver sold assets to a new National Bank—under a contract which—

in the *Gully case* required the Purchaser Bank to pay the old selling Bank's liabilities—and

in the case at bar required the Purchaser Bank to account for the purchased assets.

(2) In the *Gully case* the State Tax Collector sued the Purchaser Bank under the contract (between the Receiver and new Bank) for certain taxes owed by the old Bank.

This Court held that merely because the Purchaser Bank might have successfully defended itself from this assumed (by contract) tax liability—on the ground that the taxes were illegal under the Constitution of the United States or an Act of Congress—

did not make the case removable—as one "arising under" a law of the United States.

(3) *In the case at bar,* the suit is to compel the Purchaser Bank to account under the contract (between the agent conservator and New Bank) for the purchased assets.

That the new Bank might defend itself on the ground that the old Bank's Receiver had the right to bring the suit—does not make the cause removable. This defense it can raise in the State Courts of Michigan.

Thereupon, Plaintiffs can claim an estoppel—as pleaded in their complaint (paragraph 31, R. 21) and the question is one for the State Courts under State and Common Law alone. No Act of Congress has any possible bearing on the subject of an estoppel.

(4) Whether the new Bank—in the case at bar—must or must not account under this sale contract for assets purchased, does not depend upon any kind of a construction of any kind of an Act of Congress.

The decision for or against accounting depends upon the form, terms and construction of the contract itself.

(5) That the "agent's" power to make the sales contract in the case at bar—was given by an Act of Congress—is of no consequence under the Plaintiffs' complaint. The complaint does not deny the validity of the Sales contract—but seeks to enforce an accounting under it—

and this *right to an accounting under the terms of this contract,* does not depend upon any construction of the Act of Congress creating an "agent" called a "conservator," but

the right to an accounting depends solely on the wording and construction of the contract itself.

(6) No Act of Congress gives Plaintiffs, as depositors and stockholders, the right to question the new Bank's misappropriation of the old Bank's good-will—

whether Plaintiffs can recover on such a right of action —for a "Class" of depositors or stockholders, is a State and Common Law Question—and no Act of Congress has any bearing whatever on it.

As was said by this Court in *American Company v. Layne Company,* 241 U. S. 257, 260:

> * * * "But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. *A suit arises under the law that creates the cause of action.* The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. * * *"

POINT II

That Plaintiffs' complaint does not show a cause "arising under" and Act of Congress—see

Venner v. R. R., 293 Fed. 373 (6 C. C. A.);
L. & N. R. R. v. Mottley, 211 U. S. 149;
Tennessee v. Bank, 152 U. S. 454;
Thompson v. Oil Company, 62 Fed. (2d) 644 (4 C. C. A.); Cert. denied 292 U. S. 631;
American Nat. Bank v. Ames, 169 Va. 711; Cert. denied 304 U. S. 577;
Askins v. First National Bank, 54 Ga. Appeals, 596.

In the *Venner case, supra,* the Sixth Circuit Court of Appeals said:

> "We consider it well settled that a cause of action does not arise under federal laws, so as to justify removal, unless the plaintiff's right, to enforce which the suit is brought, arises out of and depends upon those laws, so that both in stating and in providing his case he must show that his right to recover stands upon the federal law; and that, even though his complaint may disclose that the case will turn and be ruled by the construction and effect given to some federal law under which defendant is claiming, the federal jurisdiction will fail. * * *"

That a cause presents questions of fact such as estoppel is not sufficient to permit removal.

Germania Co. v. Wisconsin, 119 U. S. 473.

POINT III

A disclaimer by Plaintiffs of any rights under Acts of Congress—is conclusive.

Tennessee v. Union and Planters' Bank, 152 U. S. 454.

In *Tennessee v. Bank, supra,* this Court said:

> "In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. * * * In the third bill, no mention is made of the Constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing act of Congress.
>
> The result is that * * * in the third case, the decree must be reversed, at the cost of the defendants, and the case remanded to the Circuit Court of the United States with directions to remand it to the state court from which it was removed."

CONCLUSIONS from *Tennessee v. Bank, supra,* are:

(a) The Plaintiffs' claims were for general taxes against the Bank "under the general tax act of the State." (Top page 455.)

(b) The Bank's charter expressly excluded all other taxes to be collected from the Bank—except a tax based on one-half of one per cent of the Bank's shares of stock.

(c) The bill asked judgment and set up that the defendant Bank claimed that the Plaintiff State's right of action for general taxes was bad because in conflict with the Federal Constitution which prohibited any State to pass any

law impairing the obligation of a contract—See top page 456.

This Court in ruling the third case not to be removable from the State Court held:

(1) That Plaintiff's pleading must show an action arising under the laws or Constitution of the United States, and which would be sustained by one construction of the Federal Statute or Constitution and defeated by another construction. See page 460.

(2) That—

> * * * "(a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States;' *Gold Washing Machine Company v. Keyes,* 96 U. S. 199, 203; and 'the question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party.' *Central Railroad v. Mills,* 113 U. S. 249, 257."

(3) That the only right of removal, where the defendant was a resident of the State, was when the plaintiff's action was one arising under the Constitution or laws of the United States.

POINT IV

The Sixth Circuit Court of Appeals has recently announced these rules, namely:

That the Complaint's statement of the Cause of Action must show that it is a suit "arising" under the Acts of Congress—and its allegations must be taken as true—for in

Teague v. Brotherhood, 127 Fed. (2d) 53—

it was said:

> "The present suit concededly is based upon private contracts between the appellant and members of his class on the one hand, and the Railroad on the other. The obligation of the contract being a creation of the state, no Federal right supports the appellant's claim that the contract has been broken. *Gully v. First National Bank,* 299 U. S. 109, 57 Sup. Ct. 96, 81 L. Ed. 70, and insofar as the complaint alleges an invasion of the plaintiff's property right to seniority through a secret, discriminatory and conspiratory agreement between the Railroad and the Brotherhood, it sounds *in tort,* and is to be adjudicated upon the applicable common law of the state. It does not raise a Federal question. The mere fact that one of the alleged conspirators comes into existence through the operation of a Federal law does not bring into question either the validity or the interpretation of the statute. *People of Puerto Rico v. Russell & Co.,* 288 U. S. 476, 483, 53 S. Ct. 447, 77 L. Ed. 903. There it was said: 'The federal nature of the right to be established is decisive—and not the source of the authority to establish it.' "

Please note that the quoted portion of the opinion covers the case at bar precisely for—

(a) The obligation of the sales contract of April 12, 1933, was a "creation of the State, no Federal right supports the appellants' claim that the contract has been broken."

(b) The plaintiffs' claim in the case at bar that the defendant, National Bank of Detroit wrongfully, by the stated cause of action, (see paragraphs 12 to 18 of the bill) appropriated the closed Bank's good-will—sounds in tort and as the Sixth Circuit Court of Appeals says in its opinion, "and is to be adjudicated upon the applicable common law of the State. It does not raise a Federal Question."

(c) And that a Bank Receiver was appointed under a Federal Statute "does not bring into question either the validity or the interpretation of the Statute."

Please note that the Court of Appeals cites the *Gully v. National Bank* opinion in 299 U. S. 109 and also that on the same page 55, that Court says:

> "It has long been settled that a suit arises under the Constitution and laws of the United States only when the plaintiff's own statement of his cause of action shows that it is based upon a Federal law, or upon the Constitution. *Louisville & Nashville R. R. v. Mottley,* 211 U. S. 149, 29 S. Ct. 42, 43; 53 L. Ed. 126."

The case of *Louisville, etc. Co. v. Mottley* (211 U. S. 149) is of interest, since it involved a suit under a contract made with the Railroad to enforce a stipulation of the contract for an annual pass, which was invalid under the recent "anti-pass" provisions of the Interstate Commerce Act.

This Court said:

> "There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a 'suit * * * arising under the Constitution and laws of the United States.' Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. * * *"

POINT V

Whether the complaint shows a cause of action "for winding up the affairs" of any such (National) Bank—or does not show such an action (see *Hannan v. First National Bank-Detroit,* 31 Fed. Supp. 276) is a matter of no consequence whatever.

Since the defendants are residents of the State of Michigan—the only ground of removal is that the complaint showed a cause of action "arising" under the laws of the United States.

See—*Gully v. National Bank,* 299 U. S. 109.

This is obvious for the Fifth Circuit Court of Appeals (81 Fed. (2d) 502), in determining that the (Gully) cause was removable from the State Court, held:

(1) *It was not removable* on the ground that the action involved a "winding up" of the National Bank, but

(2) *It was removable* on the ground that the action was one "arising under" Federal Statutes.

After the Fifth Circuit Court of Appeals had sustained the jurisdiction of the Federal Court in the removal from the State Court—

this Court reversed—and held no jurisdiction on the ground that no Federal Question was involved—*and ordered the cause remanded to the State Court.*

Obviously, had the contention of the defendant Bank that the *other ground* of removal (namely a case involving the "winding up" of a National Bank) been a good ground of removal—then this Court would not have ordered the case remanded to the State Court—*without first deciding the other claimed ground of a "winding up" on the merits.*

POINT VI

The Resident Defendants' Petition for removal—filed in the State Court—and verified on April 28, 1942, is found on pages 44 to 51 of the Record.

The petition for removal makes no pretense of claiming or showing that the plaintiffs' cause of action in the present complaint is based upon any Federal Statute—one construction of which would sustain the right of action and another construction of which would defeat the action—as is required by the rule set forth in *Gully v. National Bank*, 299 U. S. 109.

POINT VII

Summary of Petitioners' Petition on Remand Question.

It is respectfully submitted:

1st—Plaintiffs have the absolute right to so draw their complaint that it does not present or show any right or cause of action "arising under" an Act of Congress.

2nd—The complaint does not show any "cause arising" under the Federal Constitution or the Acts of Congress.

3rd—If the petitions for removal (or other papers gotten up by defendants) attempt to show a defense under some Act of Congress—it does not make a case for removal—such defenses must be submitted to the State Court where the action was commenced.

4th—Even though the defendants may claim because a receiver is acting for the defendant—First National Bank-Detroit, (now dismissed from the case by Plaintiffs) that

this makes the cause one of "winding up" a National Bank, no removal could be had from the State Court unless Plaintiffs' complaint shows *his action* arises under an Act of Congress—within the rules of *Gully v. First National Bank,* 299 U. S. 109—

for the defendants are residents of Michigan and the removal Statute of Congress *gives resident defendants only one right of removal,* namely, that Plaintiffs' action is one "arising under" an Act of Congress or the Federal Constitution.

5th—The accountings are asked under—

(a) the contract of sale of assets—for profits derived by the purchaser bank—*for which the contract required it to account,* and

(b) the acts of the purchaser, which appropriated the old Bank's good-will for nothing.

What Federal Statute then does plaintiffs' complaint rely upon—the construction of which in one way gives Plaintiffs a cause of action—and

the construction of which the other way—denies Plaintiffs a right of action?

The answer is obviously—there is none.

But—that defendant purchaser Bank could or should interpose a defense that such and such an Act of Congress gave the Conservator and Receiver

(a) the right to give away the good-will, or

(b) to waive the accounts for profits or assets sold—

does not make a case of removal—and is not one where the complaint shows an action "arising under" an Act of Congress.

6th—A mere reading of the Federal Judicial Code, 28 U. S. C. A. Section 41, Sub. (1) and 28 U. S. C. A. Sec. 71, shows that only cases against *residents* of a state may be removed from the State Courts—if they are "arising under" a Federal Statute or the Federal Constitution—within the rule of the *Gully case,* in 299 U. S. 109.

The original jurisdiction Statute, Sec. 41, *supra,* covering suits which may be started originally in the District Courts of the United States provides in perfectly clear language that such original suits must be—

(a) brought by the United States or an officer thereof—

(b) or between citizens of same state claiming lands under grants from different states,

(c) or where more than $3000 is involved, and

(1) "arises under" Federal Law or constitution, or

(2) between citizens of different states, provided the condition of amount involved shall not be applied to any of the suits "mentioned in succeeding paragraphs of this section."

NOTE: One of such "succeeding paragraphs" (16) specifies cases for "winding up" of National Banks.

The Removal Statute, Section 71, *supra,* is also perfectly clear that—no action *against residents* of a State can be removed unless it is one

(a) "arising under the Constitution or laws of the United States" of which the District Courts have original jurisdiction—but

(b) if the defendants are *non-residents* of the State where sued they may remove to the Federal Court in "any other suit of a *civil nature,* of which the United States Courts had *jurisdiction.*"

FIRST: Therefore, it is perfectly obvious that if the defendants in this case (removed from the State Courts) were *non-residents* of Michigan—then they would be entitled to argue the question whether the case at bar was one, which arises "in the winding up" of a National Bank.

SECOND: But the defendants being *residents of Michigan—they may only remove*—if the case is one "arising under" Federal Law or Federal Constitution within the *Gully v. Bank,* 299 U. S. 109 rule—above more fully discussed.

It appears decisive that defendant *residents of Michigan* cannot remove this case—under the ruling of—

Western Union Co. v. R. R. Co., 178 U. S. 239,

which reversed the Sixth Circuit Court of Appeals and ordered the cause remanded to the State Courts of Michigan.

This Court said, in its opinion by Mr. Justice Fuller:

> "Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.
>
> The Western Union Telegraph Company might have instituted its suit in the Circuit Court, but it sought the state tribunals as it had the right to do, and the defendant could not remove the case on the ground of diverse citizenship, although that fact existed, because it was itself a resident of the state. Defendant's application to remove, therefore, was based on the averment that the suit arose, 'under the Constitution and laws of the United States.'

Whether it did so arise depended on complainant's statement of its own case. *Tennessee v. Bank,* 152 U. S. 454.

* * *

The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by defendant, 'and that defendant be required to carry out said contract in good faith,' and for general relief. * * *"

POINT VIII

Conclusion of Brief on Remand Question.

I. Suits under contracts (made by receivers with purchaser of assets of insolvent banks) against the purchasers to enforce the contracts have been held not to be suits for "winding up" of the affairs of a National Bank.

See—

American National Bank v. Kate Walker Ames, et al., 169 Va. 711; Cert. denied 304 U. S. 577;

and see—

Gully v. Bank, 81 Fed. (2d) 504 (5 C. C. A.),

reversed by this Court in 299 U. S. 109, on ground that—

(1) No Federal Question was involved and therefore, case *must be remanded to the State Court,* and

since a mere reading of Section 71 of Title 28 of U. S. C. A. shows that

(2) A "winding up" suit *is not removable by a resident defendant*—no decision at all of that question was made by this Court before it ordered a remand to the State Court.

II. Section 71 of Title 28 of U. S. C. A. expressly gives a right of removal from the State Courts *to resident defendants only,* when the plaintiff's complaint shows a Federal Question involved, within the rules of *Gully v. National Bank* in 299 U. S. 109.

To the same effect see—

Venner v. R. R., 293 Fed. 373 (6 C. C. A.);
Tennessee v. Bank, 152 U. S. 454 at page 462.

III. That the contract of April 12, 1933, Exhibit A, had its source in an Act of a Conservator, as appears from Exhibit A does not show or disclose a Federal Question to be involved.

Teague v. Brotherhood, 127 Fed. (2d) 53 (6 C. C. A.).

IV. The only right of removal the defendant, National Bank of Detroit has in the case at bar is that Plaintiffs' complaint discloses an action "arising under" a Federal Statute.

Western Union Co. v. R. R. Co., 178 U. S. 239 (reversing 6 C. C. A.).

V. Since plaintiffs expressly disclaim any rights under a Federal Statute—and limit their rights of action (see paragraph 34 of this bill) to the State Statutes

and the common law in force in Michigan (see Teague case, *supra,* 6 C. C. A.) it follows that the disclaimer is conclusive.

Odell v. Farnsworth Co., 250 U. S. 501.

VI. As to the *Dinan case* opinion in 117 Fed. (2d) 459 (6 C. C. A.) it appears the point that a resident defendant cannot remove from the State Court unless a Federal Question is involved (under the Gully case rule) was not raised or decided by the Court of Appeals.

Moreover, certiorari was granted by this Court (314 U. S. 593) *and before the case got to this Court for final argument*—settlement was made to the Plaintiffs Dinan by the Defendant Receiver Schram (as petitioners are informed) after which the certiorari granted by this Court was dismissed on the petition of the Dinans—see 315 U. S. 824.

The other two decisions cited by the Court of Appeals in its opinion, namely:

Toledo etc. Co. v. Lyons, 290 Fed. 637, and
International Co. v. Weeks, 203 U. S. 364,

were not removal cases at all.

VII. One of the Plaintiffs is a resident of Michigan. Both the defendants (one was dismissed) are residents of Michigan. The Receiver is not a party at all.

The Plaintiffs could not have commenced this suit in the United States Court—there not being the requisite diversity of citizenship and the complaint not showing a Federal Question within the rule of *Gully v. Bank, supra.*

That being so—no right of removal existed—see

Armstrong v. Trust Company, 126 Fed. (2d) 164 (5 C. C. A.).

When the two previous cases brought by Plaintiffs (117 Fed. (2d) 159 and 129 Fed. (2d) 283) were commenced in the Lower Federal Court, jurisdiction existed there because it was claimed in Plaintiffs' complaints that by the proper interpretation of the Bank Conservator's Act of Congress, the sale of assets to the defendant National Bank of Detroit was invalid, (having been made before a finding of insolvency by the Comptroller) and because Federal officers were made defendants in those two cases.

Thus, a Federal question within the rule of *Gully v. First National Bank, supra,* appeared and the District Court had original jurisdiction, but no Federal Question is found in the present complaint.

POINT IX

The Dismissal on the Merits.

If this Honorable Court should reach this Second Question—not being of the opinion that Petitioners are entitled to the Writ on the Question of Jurisdiction—then Petitioners respectfully submit that a mere cursory reading of the Complaint—admitted by the motions to dismiss—shows an obvious case for an accounting of profits.

Moreover, Judge Hiram Church Ford, Senior District Judge of the Sixth Circuit, held this complaint for accounting sufficient.

He said (R. 41) that—

> "I am rather inclined to think that the complaint is sufficient to disclose an accounting called for on a charge that no accounting within the terms of the contract has been made."
>
> "My idea is that for the present this case must be dismissed for failure of the complainants to make appropriate demand in advance of undertaking to usurp the position of the Receiver. * * *"

Plaintiffs having made the demand required of them by Judge Ford in the first case—see Exhibit B, R. 37 attached to the complaint in the case at bar—

the defendant Purchaser Bank is, upon most familiar Principles, estopped to now claim Plaintiffs are not entitled to an accounting (as so held by Judge Ford in the first case) since they complied with the prerequisite to suit, the defendants there interposed.

And all such questions—both affecting the right to recovery under the sales contract, the right to appear as class plaintiffs and all defensive rights are all properly for the State Courts of Michigan where this cause originated and where it is still pending—unless this Honorable Supreme Court should upon review of the Court of Appeals' Judgment of April 21, 1944, *determine that resident defendants can remove State Court cases to the Federal Courts—when no Federal Question, at all, is raised by the complaint.*

Respectfully submitted,

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